No. 14774

# United States
# COURT OF APPEALS
## for the Ninth Circuit

ALBERT STAIN,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

## REPLY BRIEF OF APPELLANT

*Appeal from Judgment of Conviction by the United States District Court for the District of Oregon.*

G. BERNHARD FEDDE,
1014 Weatherly Building,
Portland, Oregon,
*Counsel for Appellant.*

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-55

TABLE OF CONTENTS

Page

I. Timeliness of the Form 150 ..... 2

II. Exhaustion of Administrative Remedies ..... 8

a. Appellant did exhaust his administrative remedies. ..... 8

b. Exhaustion of administrative remedies is not necessary in this case. ..... 9

(1) Lack of due process and clear error of law excuse exhaustion. ..... 11

(2) The acceptance at the induction center was "final". ..... 13

(3) Inadequacy of administrative remedies and improbability of obtaining administrative relief excuse exhaustion. ..... 14

(4) Exhaustion is not required where the purpose is not to gain an injunction or declaratory judgment, but is to defend a criminal or civil prosecution. ..... 14

III. But the Government itself has failed to exhaust the administrative remedies and is as much precluded from prosecuting as Appellant is precluded from defending. ..... 16

IV. Conclusion ..... 17

Appendix 1—U. S. v. Underwood ..... 19

Appendix 2—U. S. v. Brown ..... 25

## TABLE OF AUTHORITIES

### Cases


Page

Billings v. Truesdell, 321 U.S. 542, 88 L. Ed. 917 (1945) ..... 15

Candler v. United States (C.A. 5, 1944), 146 F. 2d 424 ..... 3

City Bank Farmers' Trust Co. v. Schnader, 291 U.S. 24, 78 L. Ed. 628 (1934) ..... 14

Eagles v. United States ex rel. Samuels, 329 U.S. 304, 91 L. Ed. 308 (1946) ..... 11

Estep v. United States, 327 U.S. 114, 90 L. Ed. 567 (1946) ..... 15

Ex parte Fabiani (E.D. Pa., 1952), 105 F. Supp. 139 ..... 4, 11

Falbo v. United States, 320 U.S. 549, 88 L. Ed. 305 (1944) ..... 15

F.T.C. v. Claire Furnace Co., 274 U.S. 160, 71 L. Ed. 978 (1927) ..... 16

Niznik v. United States (C.A. 6, 1950), 184 F. 2d 972 ..... 12

Olvera v. United States (C.A. 5, 1955), 223 F. 2d 880 ..... 6

P.U.C. v. United Fuel Gas Company et al., 317 U.S. 456, 87 L. Ed. 396 (1943) ..... 11

Schuman v. United States (C.A. 9, 1953), 208 F. 2d 801 ..... 5

Schwartz v. Strauss et al. (C.A. 2, 1953), 206 F. 2d 767 ..... 11

Skinner Corp. v. United States, 249 U.S. 557, 63 L. Ed. 772 (1919) ..... 11

Smith v. Illinois Bell Co., 270 U.S. 587, 70 L. Ed. 747 (1926) ..... 14

Smith v. United States (C.A. 1, 1952), 199 F. 2d 377 ..... 15

Page

U. S. ex rel. Berman v. Craig (C.A. 3, 1953), 207 F. 2d 888 ..... 4

United States v. Brown (D.C. N.J., 1955), Appendix 2 ..... 3

United States v. Derstine (E.D. Pa., 1954), 129 F. Supp. 117 ..... 4

United States v. Stiles (C.A. 3, 1948), 169 F. 2d 455 ..... 12

United States v. Underwood (D.C. E.D., Pa., 1955), Appendix 1 ..... 2

United States v. Vincelli (C.A. 2, 1954), 216 F. 2d 681 ..... 5

United States v. Zieber (C.A. 3, 1947), 161 F. 2d 90 ..... 12

United States Alkali Export Ass'n. v. United States, 325 U.S. 196, 89 L. Ed. 1554 (1945) ..... 16

Williams v. United States (C.A. 9, 1953), 203 F. 2d 85 ..... 2

STATUTES AND REGULATIONS

50 U.S.C.A. 451 (c) ..... 4
50 U.S.C.A. 456 (j) ..... 4, 12

32 C.F.R. 1622.1 ..... 12
32 C.F.R. 1622.1 (c) ..... 3
32 C.F.R. 1622.14 ..... 12
32 C.F.R. 1625.1 (a) ..... 3
32 C.F.R. 1625.1 (b) ..... 2, 3, 4, 5
32 C.F.R. 1625.2 ..... 4, 6, 7, 12
32 C.F.R. 1625.4 ..... 12, 13
32 C.F.R. 1625.11 ..... 13

OTHER AUTHORITIES

Davis, Kenneth Culp, "Administrative Law", West Publishing Co. 1951 ..... 10

No. 14774

# United States
# COURT OF APPEALS
## for the Ninth Circuit

ALBERT STAIN,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

## REPLY BRIEF OF APPELLANT

*Appeal from Judgment of Conviction by the United States District Court for the District of Oregon.*

The appellant, by way of reply, will deal only with the major errors in the Government's brief. Two contentions are made therein:

1. The filing of the Form 150 by the appellant was too late, and therefore the claim of being a conscientious objector had been waived.
2. By failing to appeal within the 10-day period in 1949 immediately following his I-A classification, the appellant failed to exhaust all of his administrative remedies.

Both of these the appellant denies.

## I.

## TIMELINESS OF THE FORM 150

The appellee cites no case in which a Form 150 was held to have been filed too late. Indeed, so long as it is filed before the Order to Report for Induction is mailed, it is timely and must be considered. (Compare *United States v. Underwood,* Crim. No. 17,246, E.D. Pa., March 7, 1955, .....F. Supp. ..... [see Appendix 1], where the court rejected the Government's argument on timeliness and waiver, and held that a claim of conscientious objection made *after* the Order to Report for Induction but before induction was still timely and that there had been no waiver of the privilege.) The case of *Williams v. United States* (C.A. 9, 1953), 203 F. 2d 85, cited by the Government, questioned the timeliness of the filing of a claim for a *marital* status, a totally different matter for which Congress has not seen fit to provide categorical exemption from military service. Furthermore, an appeal had not been taken; in the instant case none could have been.

The validity of the Government's argument (pp. 6-9, appellee's brief) depends on the construction placed on 32 C.F.R. 1625.1(b), quoted in part at page 7 of its brief. This section by its very terms refers to the special case of a person who is *already deferred or exempt* by reasons such as occupational, marital, dependency, military, or physical. It is in the interests of the Selective Service Administration that those no longer entitled to deferment or exemption should be compelled to divulge

that information, and promptly within ten days after change of status. But no harm is done the Administration by the failure of those *not yet* deferred or exempt to notify it of any change in status entitling them to deferment. This section gives as illustrations of its applicability those involving deferment who cease to be exempt; it does not mention anything about a person who is classified as liable to military service, such as the appellant.

Prosecutions for violations of Section 1625.1(b) have never been instituted against one who failed to claim exemption within the 10-day period after the change in status occurred. Quite the contrary, all prosecutions under this section have been for hiding the fact that the right to deferment or exemption has ended. *Candler v. United States* (C.A. 5, 1944), 146 F. 2d 424.

Further light is shed on the proper interpretation of section 1625.1(b) by the other provisions that "no classification is permanent" (32 C.F.R. 1625.1(a) ), that "the local board will receive and consider all information, pertinent to the classification of a registrant, presented to it" (32 C.F.R. 1622.1(c) ), and that nowhere in the Act does it provide that unless the registrant makes his claim to conscientious objection within ten days after receiving his classification card he thereafter waives his right to the privilege. (Compare *United States v. Brown,* N.J., March 15, 1955, Crim. No. 240-54, .... F. Supp. .... ; opinion set forth in Appendix 2.)

Appellant all these years had been I-A subject to immediate military service. To process his claim for ex-

emption under section 1625.1(b) defies the intent of that regulation as well as of Congress when it prescribed "a system of selection which is fair and just" (50 USCA 451(c) ) and then further provided specifically for the exemption of conscientious objectors (50 USCA 456 (j) ). Statutes and regulations are to be strictly construed against the Government which drafted them, and liberally in favor of registrants who are not lawyers or skilled in statutory interpretation. Registrants must not be treated like litigants assisted by counsel. *United States ex rel. Berman v. Craig* (C.A. 3, 1953), 207 F. 2d 888; *United States v. Derstine* (E.D. Pa., 1954), 129 F. Supp. 117.

Rather, the general provisions of 32 C.F.R. 1625.2 apply, quoted on page 9 of appellant's main brief. There is no time limit starting with any particular event (as the Government claims) for reopening and considering anew the classification of a registrant—only a terminal date marked by the mailing to the registrant of an Order to Report for Induction. Such Order was mailed to the appellant on October 3, 1950, and therefore the appellant's request for a change in classification, made orally on September 14, 1950, and in writing by the filing on September 20, 1950 of the Form 150 issued officially to him by the local board, was timely.

The Government, in recounting the historical events of the time, overlooks the true perspective through the eyes of the draft boards and the registrants. Until the autumn of 1950 the draft law was in the doldrums. *Ex parte Fabiani,* 105 F. Supp. 139 (E.D. Pa., 1952).

The appellant, in common with thousands of other registrants had not notified the board of any desire to change the classification. For, being inarticulate and "mildly inadequate" (according to Dr. Dickel, the psychiatrist who examined him) (Ex. No. 1), he thought he had taken the right steps to protect his rights. At least the results were right. Ever since childhood he had had his conscientious objections to military service, and ever since registering for the draft he had not been called upon to serve contrary to his beliefs. His is not a case of "foxhole religion"; long before 1950 he had held these views. Not being able to understand his theoretical predicament, he was only aware that his beliefs were not being violated and that this had gone on for years.

And he was not alone in this. During the years following 1946, when the appellant registered for the first time, scores of thousands of other registrants married, acquired dependents, were elected to office, entered deferred or exempt occupations, or acquired beliefs as conscientious objectors. Very few indeed did anything to bring their draft board records up to date, because the draft law was shriveling. When the Korean conflict broke out in June 1950, those scores of thousands who found themselves liable to military service then made their correct status known. They were not treated as deferred or exempt and therefore falling within 32 C.F.R. 1625.1(b) requiring notice within ten days of change of status; neither should the appellant. See *United States v. Vincelli* (C.A. 2, 1954), 216 F. 2d 681; *Schuman v. United States* (C.A. 9, 1953), 208 F. 2d 801.

In fact, the appellant told his plight to the Selective Service person he first met after it became apparent at the pre-induction physical examination that his beliefs were not going to be respected without something further. This was to him the first inkling that things were not going correctly according to his faith. Fortunately, the advice given was both good and correct,—to request a Form 150 and file it. And he acted immediately on it. Having made this claim before the Order to Report for Induction, it was timely under 32 C.F.R. 1625.2 for the appellant as well as for the scores of thousands of other registrants. That section of the Regulations carries no 10-day limit, and it flies in the teeth of legislative construction to intrude it.

The trend is now to require strict compliance by administrative bodies "with every procedural requirement * * * essential to the board's jurisdiction and the validity of its orders." *Olvera v. United States* (C.A. 5, 1955), 223 F. 2d 880. Olvera, like the appellant, after having passed his pre-induction physical examination filed a request for a reopening and reclassification to an exempt status. The board said that "it was not mandatory on it to reopen the classification" and that "they declined to do so." As in the appellant's case, Olvera was not notified of this decision, and therefore no appeal was taken. When he received his Order to Report, he refused. The court held that the action of the board * * *

> "* * * was arbitrary and unreasonable and ousted it of its jurisdiction to proceed further against him until his request was granted or, for a *proper reason,* refused * * *

> "Here the failure to rule formally on the request to reopen and reclassify denied Olvera of his right to an appeal from this adverse action. In fact, Olvera was not even notified of his retention in Class I-A except that the local board 'processed him for induction'." (Italics supplied.)

The claim of Olvera was held to be timely and was controlled by Section 1625.2 in which the words *"may* reopen and consider anew" were construed to require the board to rule formally whether it reopened or not so that an appeal could later be laid. It follows that the same conclusion should be reached in the appellant's case, and the Government's argument should be rejected.

The claim of the Government that the appellant did not see fit to press his views until there was a danger of being inducted, does not conform to the facts. This is not a case of "draft board fever"; for all the evidence is to the effect that he had had these views since childhood. To deny him his I-O classification is a rejection of those who have grown up in this religious tradition. Are we to understand that the Government urges a preference for "foxhole" conscientious objectors?

## II.

## EXHAUSTION OF ADMINISTRATIVE REMEDIES

The second contention of the Government is that the appellant failed to exhaust his administrative remedies when he failed to appeal his I-A classification within ten days after February 17, 1949.

The appellant replies:

1. He did exhaust his administrative remedies when he filed his Form 150 prior to the mailing of the Order to Report for Induction, and while this matter was pending he was conclusively barred from further pursuit of such remedies by the issuance of a "final order" to report for induction.
2. Even if it be held that he did not exhaust his administrative remedies (which the appellant strenuously denies), it was not necessary that he do so in order to obtain an acquittal in this criminal prosecution.

**a. Appellant did exhaust his administrative remedies.**

In the summer of 1950, over a year after having been initially classified, the appellant was advised at the pre-induction physical examination for the first time that he had to fill out a different form (T. 25). The record shows that he requested that Form 150 on September 14, 1950, filed it on September 20, 1950, and then waited for board action. What more could he have done?

As the matter stood in August 1950, he could not have appealed,—the time had expired. Furthermore, his

record had to be completed in order to furnish a factual basis for a reopening of his classification. The course he took was the only practical and lawful administrative remedy open to him, and it was through no fault of his own that the Order to Report for Induction barred further relief. This was a "final" order within the meaning of the cases authorizing judicial review.

We have already shown that the Form 150 was filed in time; see pp. 2-7 of this brief. And since the claim was seasonably made, there can be no waiver.

It follows that the appellant did exhaust his administrative remedies and is entitled to have his conviction set aside.

**b. Exhaustion of administrative remedies is not necessary in this case.**

Even if it be held that appellant did not exhaust his administrative remedies — a holding which appellant would strenuously deny — the rule does not apply in a case like the one at bar.

We have already shown that the appellant made timely application to avail himself of the orderly procedures of Selective Service only to have it end in futility. The administrative agency with its specialized understanding which should have passed on his Form 150 and the request for reclassification, refused to do so and made its ruling secretly so as to preclude any orderly administrative review. It capped this irregular procedure by issuing an Order to Report for Induction, thereby closing the door to any further relief.

Professor Kenneth Culp Davis, the recognized authority, in his book, Administrative Law (West Publishing Co., 1951), says this of the exhaustion rule:

> "The courts usually follow what the Supreme Court calls, 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted'. But even though the Supreme Court customarily states the rule without qualification, the courts in many cases relax the rule. To determine when the rule will be or should be applied or relaxed requires analysis not merely of holdings but also of reasons behind the holdings * * *
> "The principal reasons for requiring exhaustion of administrative remedies relate to efficient management and orderly procedure, use of the agency's specialized understanding, adequacy of legal remedies, exclusive jurisdiction, and statutory requirements of final order." (p. 615)

None of these reasons for requiring exhaustion exist in the present case.

Davis goes on to state the situations in which the exhaustion requirement shall not apply. We submit that the instant case falls squarely within these exceptions:

> "When pursuing administrative remedies will cause irreparable injury, when administrative remedies are inadequate, or when the agency's action is unconstitutional or beyond its jurisdiction or clearly illegal, the courts sometimes relax the requirement that administrative remedies must be exhausted before the courts will intervene." (p. 621)

In the ensuing discussion Davis groups the cases and analyzes them.

In the instant case it is submitted that the following grounds make the exhaustion of administrative remedies unnecessary.

(1) *Lack of due process and clear error of law excuse exhaustion.*

Lack of due process is referred to as excusing the exhaustion of remedies in the Selective Service case of *Schwartz v. Strauss et al.* (C.A. 2, 1953), 206 F. 2d 767, and it is the basis of cases like *Skinner Corp. v. United States,* 249 U.S. 557, 63 L. Ed. 772 (1919), and *P.U.C. v. United Fuel Gas Company et al.,* 317 U.S. 456, 87 L. Ed. 396 (1943), which relieved a party of the necessity of exhausting administrative remedies.

In *Ex parte Fabiani* (E.D. Pa., 1952), 105 F. Supp. 139, a medical student in Italy was allowed to defend against a I-A classification though he had not exhausted his administrative remedies. The court cited many cases where lack of due process and clear error of law were defenses to prosecution for selective service violations and concluded that exhaustion was excused under these cases.

*Eagles v. United States ex rel. Samuels,* 329 U.S. 304, 314, 91 L. Ed. 308 (1946), lists reasons for holding Selective Service classifications invalid as including "deprivation of petitioner of basic and procedural safeguards" and "action without evidence to support its order". This is in accordance with general administrative law. The Selective Service cases require the most minute compliance with the statute, regulations and general

principles of fairness, as shown by the following cases in which convictions were reversed or refused:

United States v. Zieber (C.A. 3, 1947), 161 F. 2d 90 (proper classification procedure not followed; new information not considered).

Niznik v. United States (C.A. 6, 1950), 184 F. 2d 972 (board showed prejudice).

United States v. Stiles (C.A. 3, 1948), 169 F. 2d 455 (proper classification procedure not followed).

It is clear from the statute, the regulations and the file in this case that in the following respects the action of the Salem draft board in classifying appellant in I-A and refusing to consider his Form 150 or to reopen his case lacked the essentials of due process and represented clear errors of law:

a) 32 C.F.R. 1622.14 and 50 U.S.C. 456 (j) make class I-O mandatory in this case—"in class I-O *shall* be placed" conscientious objectors to all military service.

b) 32 C.F.R. 1622.1 requires the local board to "receive and consider *all* information, pertinent to the classification", and Section 1625.2 authorizes a reopening for the consideration of evidence not previously before it. The failure to do so in this case is a clear violation of the letter as well as the spirit of the regulations.

c) 32 C.F.R. 1625.4 requires that "the local board, *by letter,* shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file". The failure to do neither not only violated the regulations but also deprived the appellant of any notice—a clear and flagrant violation of due process.

d) In the alternative, the local board under 32 C.F.R. 1625.11 et seq. was required to consider anew the classification, mail a new classification card, and allow the registrant a right of appearance and a right of appeal. Failure to do this deprived the appellant of substantial procedural rights under the law.

e) The action of the local board in slipping into appellant's file secretly its decision not to reopen not only violated the regulations (section 1625.4) but also the most basic elements of due process.

(2) *The acceptance at the induction center was "final".*

When the order to report for induction was issued, it barred any further action by the appellant. Only a remote possibility of rejection at the induction center was left. Not even an appeal remained to him, since the Selective Service file was in such shape that there was no appealable decision, assuming that the appellant had known of the surreptitious notation (which, however, was impossible). A rehearing could have been asked, but this board had already disregarded the evidence in his file; they had refused to reopen his classification even though they had new information before them for the first time which established a prima facie case to the conscientious objector category.

The appellant did report to the induction center, and when he was accepted for military service but refused to take the step forward, further administrative relief was useless. He had exhausted his remedy.

(3) *Inadequacy of administrative remedies and improbability of obtaining administrative relief excuse exhaustion.*

This is one of the most frequently recognized grounds for excusing exhaustion. See *Smith v. Illinois Bell Co.,* 270 U.S. 587, 70 L. Ed. 747 (1926), where the administrative agency had shown by past conduct that it would not act. In *City Bank Farmers' Trust Co. v. Schnader,* 291 U.S. 24, 78 L. Ed. 628 (1934), the Supreme Court did not require exhaustion where it was certain from previous action that the administrative officers would give an adverse decision.

In the instant case, the board had disregarded all the new evidence submitted to it; had not considered the evidence in their files; had acted secretly and adversely on the appellant's request to reopen; had failed to send any letter or notice to the appellant; and had not followed the regulations. It would have been pointless to have again asked the board to go through the same useless procedure. Exhaustion of such a remedy is excused.

(4) *Exhaustion is not required where the purpose is not to gain an injunction or declaratory judgment, but is to defend a criminal or civil prosecution.*

Nearly all the cases demanding exhaustion are equitable injunction or declaratory judgment cases. A few Selective Service cases have made brief reference to exhaustion, but in none of them has the decision really rested on the requirement of exhaustion before allowing

the assertion of a defense of illegal administrative action in a criminal prosecution. *Falbo v. United States,* 320 U.S. 549, 88 L. Ed. 305 (1944); *Billings v. Truesdell,* 321 U.S. 542, 88 L. Ed. 917 (1945). And in *Estep v. United States,* 327 U.S. 114, 90 L. Ed. 567 (1946), the Supreme Court did not decide that a person must exhaust administrative remedies. The real issue was whether Selective Service classification could be reviewed in criminal prosecutions, and it was the unanimous decision that such review was constitutionally required.

In a series of recent cases various federal courts have made it clear that they understand the "exhaustion" rule does not apply to prevent assertion of the defense that the administrative order under which a defendant is being prosecuted is invalid.

In *Smith v. United States* (C.A. 1, 1952), 199 F. 2d 377, a landlord was permitted to defend on the basis that the rent order was invalid though he had not exhausted his administrative remedies:

> "* * * We are not aware of any general judge-made doctrine that a defendant in an enforcement suit, charged with having violated an administrative regulation or order, is precluded from setting up the defense that the regulation or order is invalid, merely because the defendant had failed to make use of an available administrative procedure by which he might have obtained administrative action to set aside the regulation or order."

It is believed that this is a sound rule, for a person who is going to be charged with a crime never owes an obligation to come forward and take affirmative action;

he need only defend; he need not even then affirmatively testify in his own case. To apply the exhaustion requirement to prevent an alleged criminal from making a defense violates the due process requirements of the constitution.

## III.

## BUT THE GOVERNMENT ITSELF HAS FAILED TO EXHAUST THE ADMINISTRATIVE REMEDIES AND IS AS MUCH PRECLUDED FROM PROSECUTING AS APPELLANT IS PRECLUDED FROM DEFENDING.

This brief has pointed out the respects in which the Government has failed to exhaust the administrative process. It has disregarded the new evidence set forth in the Form 150 submitted to the local board; it has not considered the evidence in their files; it has acted secretly and adversely on the appellant's request to reopen; it has failed to send any letter or notice to the appellant of its decision; it has failed to put the file in such order that an appeal could be taken,—all in contravention of the regulations. Had it properly completed the administrative process, the present proceeding would be unnecessary.

In both *United States Alkali Export Ass'n. v. United States,* 325 U.S. 196, 89 L. Ed. 1554 (1945), and *F.T.C. v. Claire Furnace Co.,* 274 U.S. 160, 71 L. Ed. 978 (1927), the Supreme Court recognized that the Government was subject to the same excuses for and the same

rules of exhaustion of administrative remedies as others.

If the Government can insist that the appellant has lost his defense—and a very essential defense it is, going to the very essence of appellant's constitutional rights—then *a fortiori* the Government has lost its right to prosecute. If the Government be allowed to prosecute but the appellant be denied the right to defend, then the Government has "trapped" the appellant. In contravention of all its duties it has given appellant an erroneous classification; it has deprived him of the right to rely on their obedience to their oath—to administer their duties impartially and as a public trust; it has told him to give up his religion or go to jail. This cannot be the law.

## CONCLUSION

It is submitted that the Government's contentions should not be sustained, that the judgment should be reversed and the cause remanded with instructions to sustain the motion for judgment of acquittal for each and every reason above stated and for the reasons stated in the main brief for appellant.

Respectfully submitted,

G. Bernhard Fedde,
Counsel for Appellant.
Office and Post Office Address:
1014 Weatherly Building,
Portland 14, Oregon.

November 1955.

## APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | CRIMINAL |
| v. | ) | |
| | ) | No. 17,246 |
| ROBERT ALLEN UNDERWOOD | ) | |

OPINION

GANEY, J. March 7, 1955

Defendant was indicted on April 29, 1953, under § 12 of the Universal Military Training and Service Act of 1948, 62 Stat. 622, 50 U.S.C.A. Appendix, § 462, for failing and refusing to be inducted into the Armed Forces of the United States at the Induction Center, Philadelphia, Pennsylvania, in violation of the Act and the rules and regulations made pursuant thereto.

On July 24, 1950, defendant registered under the provisions of the Act with Local Board 35, Toms River, New Jersey. On December 29, 1950, he was classified I-A and duly notified. On or about October 31, 1951, he was found to be physically acceptable by the Armed Forces examining board. Thereafter an Order to Report for Induction was mailed to him on May 5, 1952. The induction date was later postponed until July 21, 1952, to enable him to complete his junior year in high school. On the latter date he reported to the Induction Center but refused to be inducted. A few days thereafter Local Board 35 of Toms River received a letter from the Arm-

ed Forces Examining Station in Philadelphia stating that defendant refused to submit to induction on the ground that he is a member of Jehovah's Witnesses. This was the first time the local board knew of any claim as to defendant's professing to be a Jehovah's Witness or his possible stand as a conscientious objector.

Subsequently, on October 17, 1952, he inquired by letter to his local board as to whether it was permissible for him to fill in a conscientious objector application. His letter of January 20, 1953 to the board is as follows:

> Dear board members,
>
> I, Robert Underwood and a Witness of Jehovah God, am requesting a reconsideration of my classification. Being a Jehovah's Witness it would be contemptible and blasphemous to Almighty God if I were to engage in warfare, and so in complying with the laws of the land my only alternative is an appeal for I-O, Conscientious Objector.
>
> Due to a misunderstanding of the legal procedures I failed to record my appeal at the set time for such, but urgently request forgiveness. If you decide to grant my petition at this time it will be considered a great favor in my behalf.
>
> Supposing that you send me a Conscientious Objector's form, I will fill it out and return it by mail if satisfactory to you. Or upon your request I would gladly appear for interview.
>
> It is entirely up to you and I await your decision.

In the latter part of January he sent letters to the draft board requesting a change in his classification and for an interview. By letter dated February 4, 1953, the draft board replied that it had communicated with the

proper authority [1] as to the advisability of reclassifying him and that they would notify him when it received the information. In March and April he again sent letters to the draft board requesting a change in his classification and for a hearing. The draft board in a letter dated July 10, 1953, advised the defendant that it did not have authority to make the reclassification.

Regulation 1625.2, CFR 1625.2, promulgated pursuant to the Act, entitled *"When registrant's classification may be reopened and considered anew."* provides in pertinent part as follows: "The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant . . . or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." The local board has not made a specific finding that there had been such a change in the defendant's status.

On the basis of this regulation, the Government contends that the local board, after having mailed the Order to Report for Induction to the defendant, acted within

---

[1] The "proper authority" was the U. S. Attorney's Office in Newark, New Jersey.

the law in not reopening his classification, regardless of the merits of his claim.

Regulation 1625.2 is clear. We believe § 6 (j) of the Act, 50 U.S.C.A. Appendix, § 456(j), is equally clear. That section provides: "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." It is plain that a person meeting the conditions of the above section of the Act is not to be subjected to combatant training and service. This privilege is not to be defeated by procedural regulations. Nowhere in the Act does it provide that unless the registrant makes his claim before notice of induction he thereafter waives his right to the privilege. Had Congress so intended, it would have set forth such intention in unmistakable terms. See United States ex rel. Hull v. Statler, 7 Cir. 1945, 151 F. 2d 633, 635; United States v. Clark, W.D. Pa., 1952, 105 F. Supp. 613, 615. Although in both of the cited cases the claim of conscientions objector was made prior to the time notice for induction was sent, the reasons given in support of the holdings apply to the present criminal action. However, in United States v. Crawford, [2] a case in which the registrant raised the claim of conscientious objector for the first time nine and a half months after he received an order to report for induction, District Judge Edward P. Murphy said: ". . . While regulation 1625.2 is not invalid on its face, it can have no applicability to a claim of

[2] Criminal No. 33,742, N.D. Cal., S. D.....F. Supp.

conscientious objection, whenever made, so as to deprive the objector of a hearing at which he may prove his good faith.

"No such hearing having been offered defendant, the United States has not made the condition precedent to a prosecution for draft evasion."

We are aware of the burden upon a registrant to establish his eligibility for deferment or exemption to the satisfaction of the local board. See United States v. Scoebel, C.A. 7, 1953, 201 F. 2d 31, 32. Nevertheless we think that the local board, when it received notice from the Armed Forces Examining Station of the reason of defendant's refusal to be inducted, should have sent notice to him at his registered address that it would grant him a hearing on the merits of his claim. If the notice of his refusal to be inducted should be considered insufficient, certainly defendant's letters from October 17, 1952 to the month of April, 1953 made the board cognizant of his claims of conscientious objector and that he desired a hearing concerning that claim. District Judge Grim's instructions in United States v. Derstine, [3] are appropo here:

"Registrants are 'not to be treated as though they were engaged in formal litigation assisted by counsel.' United States ex rel. Berman v. Craig, 207 F. 2d 888, 891 (C.A.3, 1953). Whenever a registrant in writing makes a request to a Local Board, no matter how ambiguously or unclearly the request is stated, if it indicat-

---

[3] Criminal No. 16, 715, E. D. Pa., March 30, 1954,.....F. Supp.....

ed in any way a desire for a procedural right, the writing should be construed in favor of the registrant and the procedural right granted, or the registrant should be contacted by the Board to obtain clarification of what he had in mind when he made the request."

Accordingly, it is the verdict of this Court that the defendant, Robert Allen Underwood, is not guilty of the crime charged in the indictment.

Filed March 7, 1955.

## APPENDIX 2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | CRIMINAL |
| vs. | ) | NO. 240-54 |
| | ) | OPINION |
| NELSON JULIUS BROWN. | ) | |

MEANEY, District Judge.

Defendant was indicted under U.S.C., Title 50, Appendix, sec. 462—Universal Military Training and Service Act—for knowingly failing and refusing to be inducted into the Armed Forces of the United States as so notified and ordered to do.

It appears that Brown was a registrant with Local Board #119 in Virginia, and on June 26, 1952 was reclassified I-A by that board. He had had a student deferment prior to that time. The board mailed a Notice of Classification (Form #110) to the defendant on June 27, 1952. An order to report for induction was sent on August 11, 1952. On August 10, 1952 Brown appeared at the office of Board #119 and revealed his claim of being a conscientious objector. Three days later he filed Form #150 (Special Form for Conscientious Objectors) with the board. On August 26, 1952 the board notified Brown that the information submitted by him was insufficient to warrant any reopening of his I-A classification. Brown was further advised that he would have to report for induction, as ordered, on August 28, 1952. Some time prior to August 28, 1952, defendant moved

to New Jersey and requested that his file be transferred there. This was done and Brown again refused to comply with the induction order on September 19, 1952. He was indicted for this refusal.

Brown waived trial by jury as provided by Rule 23 (a) of Fed. Rules Crim. Proc., 18 U.S.C.A. He also stipulated that the Selective Service file be considered in evidence, as well as his refusal to report for induction.

On December 7, 1954 trial was had in this court. The defendant took the stand and testified as to the foregoing facts. However, he claimed that all of the messages sent by the local board in Virginia subsequent to June, 1952 had to be forwarded to New Jersey where he maintains he was then residing. We do not find this important to our determination.

The counsel for the defendant at the conclusion of the case made a motion for entry of a judgment of acquittal. The court reserved decision. The following argument of law was made in support of the defense motion.

> "I. It was the duty of the Local Board to reopen and consider anew the defendant's classification in view of the new and additional evidence filed with the Local Board, showing that defendant was a conscientious objector, and the failure to reopen, thereby providing for an appeal, was arbitrary and capricious. In the event that it is found that the Local Board did reopen the defendant's classification, the denial of the status of conscientious objector to the defendant was without basis in fact, arbitrary, capricious and contrary to law.
>
> "II. The filing of the Special Form of Conscientious Objector constituted basis for reopening defendant's classification, and the Local Board's re-

fusal to reopen and reclassify the defendant was an abuse of discretion that nullified the Draft Board proceedings."

The isue with which the court is confronted involves the validity of the local board's refusal to reopen Brown's classification after he filed Special Form for Conscientious Objectors (Form 150) on August 21, 1952, which was subsequent to the time defendant had been ordered to report for induction. 32 C.F.R. §1625.2 affects the situation here. This is the section which counsel agree is basically controlling and which was in effect at the time. It provides in part:

"1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

This section implicity contains a direction to the board to examine the evidence submitted to it of change in the registrant's status. Otherwise it would be more or less meaningless. It is evident that the board did one of

two things—either it failed to consider the applicant's request for change of classification to that of conscientious objector, or it failed to find sufficient reason therein to warrant such change. If the first be the fact, then the board acted arbitrarily and deprived the registrant of a right. If the second alternative was the one pursued, then the board acted arbitrarily in not reopening and considering the alleged change of status, since there is nothing in the record to offset the statement alleged in the application for reclassification as a conscientious objector. *Dickinson v. U. S.,* 346 U.S. 389.

The Government's argument that by exposing himself voluntarily to the teachings of the Jehovah's Witnesses and then accepting them, a change in status resulted from circumstances over which Brown had control, and that the therefore would not be entitled to reopening and consideration of his classification, seems to this court to border on the naive. One does not compel religious conviction, and the operations of the human mind are as mysterious as they are unpredictable in the acceptance or non-acceptance of belief.

In view of the foregoing, this court is of the opinion that a judgment of acquittal should be entered.

Let an order in conformity with theis findings be submitted.

* * * * *

Filed March 15, 1955.